No. 22,148

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Appellee.

Appeal from the United States District Court for the Northern District of California

APPELLANT'S SUPPLEMENTAL BRIEF

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A. THE SIGNIFICANCE OF HANOVER

Appellant contends that *Hanover Shoe*[1] requires reversal of the judgment below for the following reasons.

1. *Hanover Shoe* has sustained appellant's position that the Court below was without jurisdiction to dismiss appellant's complaint on the merits with prejudice. The Supreme Court has not yet ruled that the doctrine of prospectivity is applicable in private antitrust cases. As such the Pre-Trial Order and hearing on the equities below were without authority and are in conflict with the Constitution and Sherman Act. Clearly, had *Simpson* been authority for prospective application of Sherman Act decisions the Supreme Court would have said so. Instead it declared that the issue had not yet been decided (88 S. Ct. 2224, 2233).

2. This Court is not required to reach the threshhold proposition as to whether or not the doctrine of prospectivity is applicable to treble damage cases because just as in *Hanover, Simpson v. Union Oil Company of California*[2] did not adopt a radically new interpretation of the Sherman Act. It was not, "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which, in effect, replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension and development of existing authorities which had been growing and developing over the years." *(Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 88 S. Ct. 2224, 2234.) In 1940 the Supreme Court made clear in *United States v. Socony-Vacuum Oil Company,* 310 U.S. 150 (1940), that price fixing agreements were illegal *per se.* As stated by appellee's chief counsel, Moses Lasky in his article, "*Metaphysics v.*

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[1]The Hanover Shoe, Inc. v. United Shoe Machinery Corp.; United Shoe Machinery Corp. v. The Hanover Shoe, Inc., ... U.S. ....., 88 S. Ct. 2224 (1968).

[2]377 U.S. 13 (1964).

Reality in Antitrust Law," 26 California State Bar Journal 28 (1951), 30:

> "As the decisions now stand, almost, but not quite, every arrangement affecting competition is now likely to be held a restraint. The literal meaning has become almost, but not quite, the accepted meaning[13]".

Prior to *Socony Vacuum,* the Supreme Court made clear in *Ethyl Gasoline Corp. v. United States,* 309 U.S. 436 (1940) that the *General Electric*[3] case would be limited to bona fide attempts by patentees to achieve a reward for their inventions. The Supreme Court made clear that it would pierce schemes to control resale prices under the guise of patent licenses. Then came *Socony-Vacuum* condemning all price fixing arrangements affecting interstate commerce as illegal per se. *Socony-Vacuum* was followed by *United States v. Univis Lens Co.,* 316 U.S. 241 (1942) and by *United States v. Masonite Corp.,* 316 U.S. 265 (1942). In *Univis* the Supreme Court held that *General Electric* did not authorize a patentee who sells his products to be finished by wholesalers and retailers to maintain a system of resale price maintenance even though the wholesalers and retailers may practice the patent. It set forth clear doctrine:

> "Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, . . . , and restrictions imposed by the seller upon resale prices of articles moving in interstate commerce were, until the enactment of the Miller-Tydings Act, 50 Stat. 693, 15 U.S.C.A. § 1 consistently held to be violations of the Sherman Act." (316 U.S. 241, 253).

Masonite held that the Sherman Act prohibited the use of assumedly bona fide agency or consignment agreements by a patentee to maintain resale prices in interstate commerce when not within the confines of a single

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[3]United States v. General Electric Co., 272 U.S. 476 (1926).

license to manufacture, use and vend as protected by the patent laws. The basic issue there decided was whether or not the Sherman Act invalidated bona fide agency devices when used to administer prices pursuant to patent licenses even though they were otherwise legitimate contracts. The Supreme Court held that the Sherman Act was paramount in the sphere of attempts of a single company to administer prices in an industry. In so doing, it ruled as follows:

(1) It limited *General Electric* to a case involving a patentee's granting of a license to manufacture, use and vend when entered into for the purpose and with the effect of securing to the patentee only a reward for his invention. (2) Owners of non patented articles could not enter into resale price maintenance. *Masonite* clearly reemphasized *Dr. Miles*[4] as authority preventing the use of agency price administrating agreements (316 U.S. 265, 279-280). (3) A patentee who licenses any more than a single enterprise to manufacture the article and vend could not regulate the resale prices of licensees whether they be deemed bona fide agents or not. (4) The test to be applied under the Sherman Act in marketing arrangements involving agreements fixing resale prices was as follows:

> "So far as the Sherman Act is concerned the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade [316 U.S. 280]."

Masonite's[5] severe limiting of *General Electric* to only resale price control incident to a single license to man-

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[4]Dr. Miles Medical Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911).

[5]Appellee contends that the *Masonite* decision is not apposite here because *Masonite's* facts involved price fixing agency agreements between horizontal competitors. But, of course, *Masonite* cut a deeper thrust than that and clearly was learning that the courts

ufacture, use and vend for the purpose of reward under patent law was followed by a Department of Justice decision to continue to seek to overturn *General Electric* which it sought in *Univis*. The affirmance of *General Electric* only by virtue of an equally divided court in *United States v. Line Material Company,* 333 U.S. 287 (1948) made *General Electric* useless precedent unless patentees followed its precise boundaries. Four justices would have completely overruled *General Electric.* Further the majority of the Supreme Court in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948) made clear that the Sherman Act's prohibitions against price fixing agreements would govern attempts to use the *General Electric* case as a means of regulating resale prices in interstate commerce; that the *General Electric* case did not authorize the use of price fixing clauses in licenses to manufacture and vend among competitors. The Sherman Act was held predominant over any scheme in restraint of trade. The Court held that *Masonite* compelled the result. And, of course, *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944) made clear that a distributor of a trademarked article could not administer resale prices. Then came *United States v. McKesson & Robbins, Inc.*

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under the Sherman Act would determine the effect of agency or consignment agreements in terms of restraint of trade. Even assuming appellee's position, this would not save the Union Oil scheme because its dealers were competitors in the sale of gasoline products. Union Oil raised the McGuire Act defense in the trial court below. After proof that its wholesale division sold gasoline to consumers in competition with retailers (Tr. 1468-1477) and upon an offer to prove horizontal price fixing, Union Oil abandoned this defense (Tr. 1503-1504). Union Oil had to decide whether or not it would use Fair Trade by giving up its wholesaling of gasoline to consumers eliminating its wholly owned operations, establishing a single uniform price, and using court enforcement instead of ouster under *Esso Standard Oil Co. v. Secatore's, Inc.,* 246 F.2d 17 (1st Cir. 1957) cert. den. 355 U.S. 834, and *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305 (1956) or whether to violate existing decisional law by continuing to wholesale to consumer accounts yet using consignment devices with competitive dealers.

supra, at n. 5, which re-emphasized the rule against vertical price control.

Further, the outlawing of the use of coercion on retailers to administer resale prices established in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) was reiterated in *Bausch & Lomb,* and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

In summary, it is clear that prior to June, 1958, the Supreme Court had declared that producers of non-patented articles engaged in interstate commerce could not administer resale prices unless the McGuire Act applied. The result in *Simpson* was not innovative and naturally followed *Masonite.* Just as in *Hanover,* prior to *Simpson,* "potential antitrust defendants would not have been justified in thinking that the then current antitrust doctrines permitted them to do all acts conducive to control of resale prices so long as they used the consignment device." (88 S. Ct. 2224, 2234).

3. Even assuming that potential antitrust defendants could have relied on *General Electric* in 1958, it is clear that *Hanover* does not prevent this court from ruling that the doctrine of prospectivity does not apply to treble damage Sherman Act cases. See Appellant's Opening Brief, pp. 23-37.

B. THE CONTENTIONS OF APPELLEE CONCERNING HANOVER ARE UNMERITORIOUS

Hanover Shoe clearly reversed appellee's primary authority in the arguments below. Appellee had submitted to the court below the appellate court decision in *Hanover Shoe* shortly prior to the day of argument on the so-called equities, April 28, 1967 (Tr. 1697). Yet appellee now takes the position that, in effect, the Supreme Court has already decided in *Hanover* the case

of *Richard S. Simpson v. Union Oil Company of California.* Its reasoning is extraordinary. At pages 5 to 7 of Appellee's Supplemental Brief it summarizes its position. We set forth our comments by reference to these contentions.

(1) Appellee states that *Simpson* established that there could be non-retroactivity in treble damage actions in proper circumstances. As seen above, this is not so. *Hanover* makes it quite clear that *Simpson* did not reach this threshold issue because the Supreme Court specifiically stated that it would not determine whether or not there could be prospective application in treble damage cases of innovative principles. Had *Simpson* decided that matter, the Supreme Court would have indicated such to be the case. Rather it indicated, to the contrary, that it would not reach that issue.

(2) The significance of *Hanover,* according to appellee, is that it spells out the elements governing the retroactivity of the *Simpson* decision in this appeal. But, as indicated above, the Supreme Court has not ruled whether or not the doctrine of prospectivity will apply in civil treble damage actions. In *Simpson* as in *Hanover* the question is reserved. These elements, however, as shown herein, prevent a showing of prospectivity and show that this court need not reach the threshold question.

(3) Appellee urges that the five elements governing principle of retroactivity are mixed questions of law and fact, decided by the District Court in appellee's favor. Appellant urges that *Union Oil* fare no better than did *United Shoe Machinery Company.* Appellant has urged as clearly erroneous or as immaterial and irrelevant the findings of fact decided by the District Court below.

(4) Appellee urges that the District Court's findings on reliance are conclusive. But these findings, even

if relevant, are clearly erroneous. The coercive aspects of the program were not submitted by Union Oil Company to its general counsel but were left to marketing. (Tr. 1176, 1180). There can be no finding of justifiable reliance on this record. Union Oil did not even attempt to obtain the opinion of outside counsel but relied upon an employee to render a decision of law. It has failed to present even a contemporaneous written analysis of the issues by its counsel.

(5) Appellee urges that *Hanover,* in effect, requires a decision in appellee's favor. *Union Oil* cannot meet the *Hanover* tests.

(i) Clearly declared judicial doctrine—as seen above —there never was clearly declared judicial doctrine in 1958 that owners of non-patented articles could administer resale prices against the thrust of the Sherman Act by calling the relationship between it and retailers consignment or agency. Since *General Electric* involved patented articles any indication to the contrary was simply dicta. As stated in Simpson the patent laws were the *ratio decidendi* of the *General Electric* case. 337 U.S. 13, 24. Dicta does not constitute clearly declared judicial doctrine. *Hanover Shoe, Inc. v. United Shoe Machinery Corporation.* (88 S. Ct. 2224, 2234, n. 13.)

(ii) Reliance—Defendant could not validly argue that they relied upon the *General Electric* case even assuming the dicta is construed as clearly declared judicial doctrine. As pointed out above and in Appellant's Reply Brief, pages 9 and 10, since *General Electric* there were six lines of development upon which the retail dealer consignment agreement program would be affected and which Union Oil attorneys were bound to know.

Having learned of the severe limitations placed on *General Electric,* the flat prohibitions against resale price

control and that lease instruments created bona fide real property interests in service station leases which shielded them from marketing arrangements restricting the dealer's independent judgment by use of the leases as coercive devices, Union Oil cannot be treated as an innocent law violator. *Standard Oil Co. of California and Standard Stations, Inc. v. United States,* 337 U.S. 293 (1949), *United States v. Richfield Oil Company,* 343 U.S. 922 (1952) affirming *per curiam,* 99 F. Supp. 280 (1951), see also *United States v. General Motors Corp.,* 121 F.2d 376 (7th Cir. 1941), *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594 (1953), *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1 (1958).

(iii) *Union Oil's* conduct was lawful—*General Electric* did not make lawful the fixing of resale prices by threats and ouster. These factors were absent from the *General Electric* case which was concerned with a stipulated record. But Union chose to use consignment coercively. There was nothing in *General Electric* to sustain using consignment coercively.

(iv) A doctrine which was overruled—*General Electric* was not overruled in *Simpson.* By reason of what is asserted above *Simpson* did not overrule the use of consignment coercively. Even assuming that *General Electric* was clearly declared doctrine for such a proposition, the Supreme Court opinion in *Simpson* clearly did not overrule *General Electric.* The Supreme Court said specifically it refused to extend *General Electric.* 377 U.S. 13, 24. Justice Stewart stated that the majority did not expressly overrule *General Electric.* 377 U.S. 13, 26-27.

(v) Conduct became unlawful only by new rule—Union Oil Company used consignment coercively; there was no new rule announced in *Simpson.* Union Oil was bound to know judicial limitations in *General Electric,* the affirmation of *Dr. Miles, Beech-Nut* and the prohibi-

tion on using short term leases to enforce restrictive marketing arrangements as established in *Standard Oil of California,* supra; *Richfield,* supra.

C. OTHER MATTERS

In its heading, Reply To New Matter In Appellant's Reply Brief, appellee has gone beyond the request of its motion to file a supplemental brief. However, appellee responds as follows:

1. The *Line Material* Case, *United States v. Line Material Company,* 333 U.S. 287 (1948). *Masonite* established the Sherman Act as paramount over assumedly bona fide agency devices. *Line Material* jeopardized *General Electric* as reliable precedent in any field. Nothing appellee Union Oil says contradicts appellant's statement that the applicability of *General Electric* as precedent under the Sherman Act in non-patent cases was repudiated in *Masonite* and *Gypsum.* They clearly indicated that the Sherman Act would govern attempts to administer resale prices when resale price control was not thought to "secure to the patentee only a reward for his invention." *(United States v. Masonite Corporation,* 316 U.S. at 280), and could not cloak arrangements in restraint of trade under the Sherman Act. (Id. 278-280.) *United States v. United States Gypsum Co.,* 333 U.S. 364, 400-401. The case cited by appellee, *United States v. Huck Manufacturing Company,* 227 F. Supp. 791, affirmed by equally divided court, 382 U.S. 197 (1965) was a case decided under patent law. Of course, so was the cited *General Electric* litigation. *United States v. General Electric Company,* 82 F. Supp. 753 (D.N.J. 1949); 115 F. Supp. 835 (D.N.J. 1953). But see *United States v. General Electric Co.,* 80 F. Supp. 989 at 1007 (S.D.N.Y. 1948.)

2. Next, appellant discusses *Perma-Life Mufflers, Inc. v. International Parts Corporation,* 88 S. Ct. 1981 (1968). Appellant fails to see how settled matters decided by a court of law can be used by a court of equity to reach a contrary result. See *Beacon Theatres Inc. v. Westover,* 359 U.S. 500 (1959); *Florists Nationwide Delivery Telegraph Network v. Florists Telegraph Delivery Association,* 371 F.2d 263 (7th Cir., 1967), cert den. 387 U.S. 909 (1967). *Perma-Life* clearly entrenches *Simpson* and makes certain that *Simpson's* conduct in dealing with those bent on promulgating an assumed unlawful scheme does not bar *Union's* liability when viewed either through law or through the eyes of equity.

CONCLUSION

It is respectfully submitted that the judgment be reversed and that judgment in favor of plaintiff be rendered on the jury verdict.

Dated, San Francisco, California,
September 24, 1968.

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